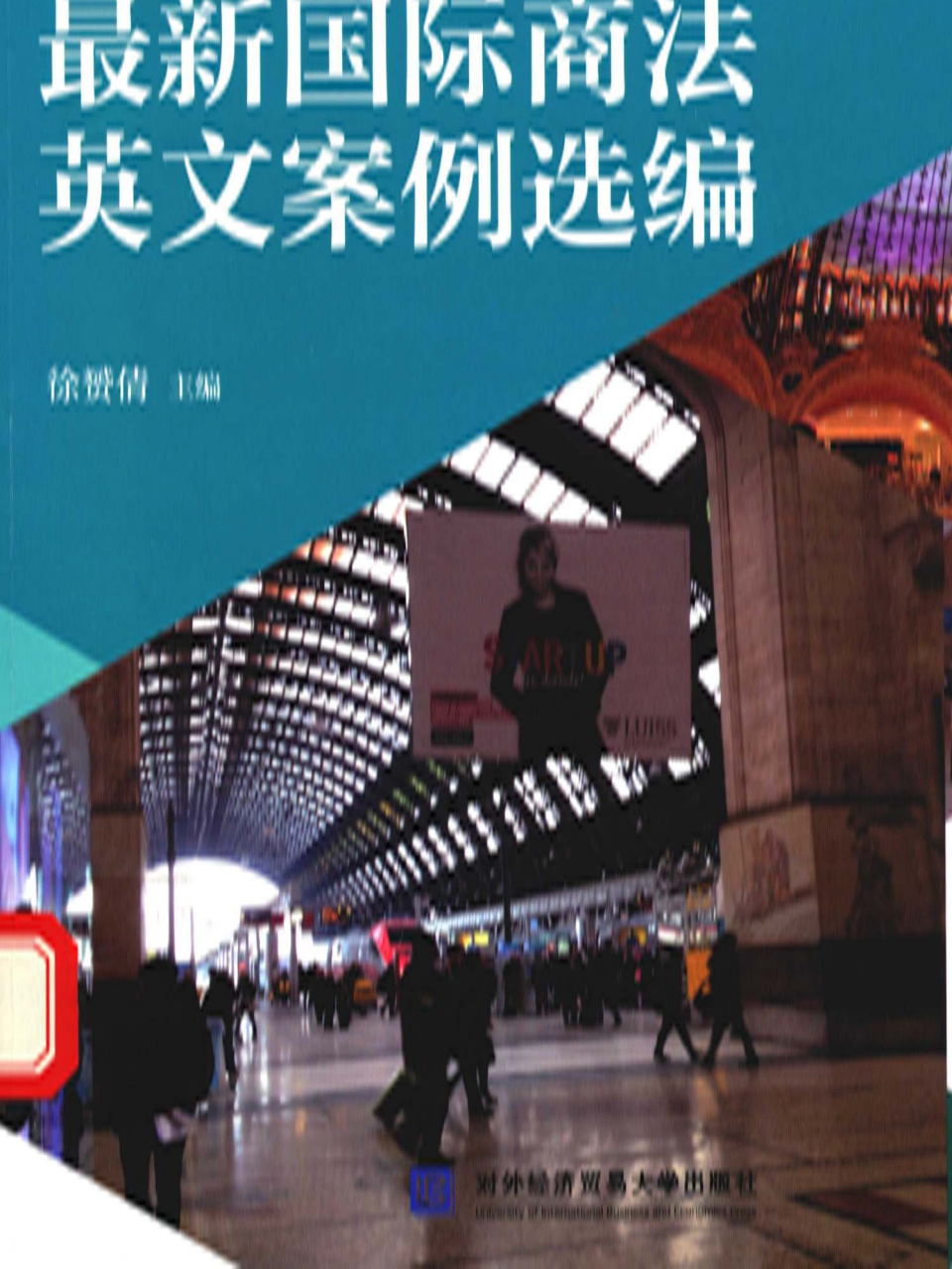
全国高等院校双语案例教程系列教材

Selected Cases

and Readings on International Business Law

最新国际商法英文案例选编

徐贵信 主编



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前　言

商务和法律教育的目标不仅要使学生系统掌握理论和规则，还应培养学生的思辨能力，使其能够将特定的规则与相应的生活实践联系起来，并进而运用规则去解释和处理现实生活和工作中的问题。因此，高等院校的专业教学应该以学生为中心，使教师的“教”和学生的“学”相结合，调动学生的积极性，才能较好地实现教学目的。案例教学侧重于实践教学，从素质教育和培养学生创造能力的角度，对激发学生专业学习兴趣、培养学生专业素质、提高学生在实践中探究学习方法的自觉性、有效地将理论知识转化为专业技能等多方面都能发挥重要作用。

本书适用于各高校的商学院、法学院以及其他学院的国际商务专业及商务英语专业的教学，主要为全英教学或双语教学的商务类或法律类课程，提供具有参考价值的、国内外有影响力的国际商法案例。既可帮助学生加深对国际商法基本概念、实践操作的理解，同时也为教师在教学中选择案例、组织讨论提供便利。

与其他同类案例教材相比，本书在编写过程中贯彻了如下特点：

1. 本书并非以某一本特定的商务或法律英文原版教材的编写结构为顺序来编写案例，而是按一般商法教材的编写结构，涉及国际商法的几大领域，如公司法、合同法、销售法、代理法、票据法、WTO 法、竞争法、电子商务法。这样有助于各所高校选择不同英文原版教材的教师在教学过程中按不同主题选择案例。

2. 本书在案例的选择上经过仔细筛选，兼顾其影响力和时效性。案例多选择美、英、中、澳等经济大国的案例，多选择具有重大影响力甚至是里程碑意义的案例，并纳入不少 2000 年后国内外的新近案例。

3. 本书在编排结构上注重有针对性的引导学生思考，并非是英文案例的简单堆积。

在每一章节开篇设置导读部分“Introduction”，对本章节内容进行提纲挈领的介绍，以最基本的法理和知识要点为主，兼顾整体性，方便学生复习或预习该主题。

每一节大多选取两个左右的典型案例。在每一案例的正文之前设置“热身练习”（“Warm-up Questions”），让学生有预设性地进行阅读和分析，方便学生预习案例，更方便教师组织课堂案例讨论。在整章之后设置“讨论题”（“Questions for Discussion”），便于学生复习本章要点或进行发散性讨论，引导他们深入思考相关理论知识和实际问题。

在此，感谢各位编者的辛勤劳动（本人负责第二、三、六、七章和主编工作，胡春

华老师负责第一、四、五章，王宇老师负责第八章，余蕾老师负责全书的审校工作）。虽然编者们都怀着美好的设想，以认真的态度进行本书的编写工作，但因为能力和时间有限，本书的疏漏和错误在所难免，敬请各位读者、老师及专家们不吝赐教、予以斧正，在此深表谢意。

徐赟倩

2014 年初夏于羊城

Contents

Chapter 1

Company Law

Introduction

Why are companies so important? A huge proportion of the world's wealth is created by companies and companies are most often employed by people as a tool for running a commercial enterprise.

One great advantage of the most widely used type of company is that it has "limited liability", which means that if the company fails to pay its debts, the shareholders of that company will not have to contribute towards paying the company's debts out of their own private funds: they are liable to pay only the amount they have paid, or have promised to pay, for their shares. Therefore, limited liability is also considered to encourage greater boldness and risk-taking among the business community, so that new avenues to increase commerce are explored.

On the other hand, the management of the company is vested in a board of directors and not in the shareholders themselves. If there is a disagreement between the shareholders of the company and the management in the form of the directors, complicated issues arise. Another tension is created between shareholders and creditors where the subject of disposal of the assets of the company is concerned. There are many other tensions which will appear in a study of this subject. The technicalities of the subject become more comprehensible if the law is seen as struggling to hold a fair line between competing interest groups. The debate as to the proper degree and method of regulating this balance of interests is often referred to as the "corporate governance debate".

So, the company laws attempt to achieve a balance between the various interested groups within companies and also between the protection of people dealing with companies and the freedom of act of those managing companies.

Warm-up Questions:

1. Why are companies a widely used form of business association?
2. How should the creditor seek relief if a liability has been clearly incurred in the name of a company but the company has become insolvent?
3. What duties does a director owe to the company?
4. Under what circumstances can the shareholders sue the company?

Section One Corporate Personality

Doctrine of Corporate Personality

The simplest, also the most useful way to view a corporation is to take it as an artificial person rather than a group of owners or investors. This artificial person may run a business or businesses in its own name much the same way as a "real" person. Business is done, assets are required, contracts are entered into, and liabilities are incurred, all in the name of this artificial person. This artificial person has most of the legal rights of a natural person: it may sue or be sued, it must pay taxes, it may apply for business licenses in its own name, have its own bank account, and it may hire employees, and so forth.

Operating a business in this way often has advantages over conducting business in the name of one or more persons. The most obvious one is that the corporation is infinitely liable for the debts and obligations of the business while the shareholders are not, since in theory all debts are the artificial entity's obligations instead of the shareholders'. In this way, the shareholders only risk what they have invested but that's it and no more; in legal language the shareholders share limited liability.

A corporation has other traits that make it different from other business forms:

a) The existence of the corporation does not rest with whom the owners or investors are at any single time. If shareholders die, or decide to sell out, the corporation continues to exist as a separate entity. In legal language, a corporation has uninterrupted life.

b) The corporation has an infinite life span. Not that a corporation can perpetually exist but it will continue indefinitely until the owners decide to dissolve it or merge it into another business.

c) The management of the corporation is vested in a board of directors (who are elected by the shareholders) instead of the shareholders themselves. There is a core management organization in a corporation.

d) The ownership interests of the shareholders may be sold or transferred to third persons needless of the approval or consent of the corporation or other shareholders.

"Piercing the Corporate Veil"

Ordinarily, a corporation is taken and treated as an individual legal person, so the law will not look into a corporation to see who actually owns or controls it.

A court may look over the corporate entity, or figuratively "pierce the corporate veil," when extraordinary circumstances permit. The decision whether to disregard a corporate entity is made on a case-by-case basis, weighing all factors before the court. Factors that may lead to piercing the corporate veil and imposing liability on its owners (the shareholders) are: (1) failure to maintain adequate corporate records and messing up corporate and other funds, (2) grossly improper capitalization, (3) diver-assets, (4) the formation of the corporation to avoid an existing obligation, (5) the formation of the corporation to perpetrate a fraud or conceal illegality, and (6) a determination that injustice and inequitable consequences would result from the corporate entity.

Case 1-1-1 *Carte Blanche Pte., Ltd. v. Diners Club International, Inc.*

Case Study Questions:

1. According to New York law, in what situations the corporate veil shall be pierced?
2. What factors involving the interactions between parent and subsidiary shall be examined while the court determines whether a parent corporation's control and domination requires the court to disregard the corporate form?

Carte Blanche Pte., Ltd. v. Diners Club International, Inc.[1]

2 F.3d 24 (2nd Cir. 1993)

GEORGE C. PRATT, Circuit Judge:

Plaintiff Carte Blanche (Singapore) Pte., Ltd. (CBS) appeals from the judgment dismissing its complaint after a non-jury trial. CBS had obtained an arbitration award against defendant Carte Blanche International, Ltd. (CBI), based on CBI's breach of a franchise agreement that authorized CBS to market and service Carte Blanche credit cards in Malaysia, Singapore and Brunei. Unable to collect from CBI, which had ceased operating by the end of 1983, CBS brought this action to pierce the corporate veil and collect on the judgment from Diners Club International, Inc., the corporate parent of CBI. The district court concluded that the corporate veil should not be pierced and directed entry of judgment in favor of defendants.

Generally speaking, a parent corporation and its subsidiary are regarded as legally distinct entities and a contract under the corporate name of one is not treated as that of both. While "New York is reluctant to pierce corporate veils..." *Gorrill v. Icelandair/Flugleidir*, 761 F.2d 847, 853 (2d Cir.1985), exceptions are made in two broad situations: to

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[1] Available from http://openjurist.org/2/f3d/24/carte-blanche-pte-ltd-v-diners-club-international-inc [accessed February 15, 2012].

prevent fraud or other wrongs, or where a parent dominates and controls a subsidiary. Recently, Judge Cardamone of this court carefully analyzed New York law on piercing the corporate veil:

Liability therefore may be predicated either upon a showing of fraud or upon complete control by the dominating corporation that leads to a wrong against third parties. Determining whether a parent corporation's control and domination requires the court to disregard the corporate form calls for examination of a number of factors involving the interactions between parent and subsidiary. Some of them were described by Judge Cardamone in Passalacqua as follows:

(1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, i.e. issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) common office space, address and telephone numbers of corporate entities, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated corporation at arm's length, (8) whether the corporations are treated as independent profit centers, (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and (10) whether the corporation in question had property that was used by one of the corporations as if it were its own.

Applying these principles to this case, we conclude that the breach of the franchise agreement that caused CBS to suffer the damages found by the arbitrators was the result of domination and control of CBI by its parent, Diners Club. The reasons for our conclusion become clear from a review of the uncontested facts.

The question, however, is whether it did so act in 1984 when the franchise agreement was breached, or whether, on the other hand, its actions were then dominated and controlled by its parent, Diners Club, and grandparent, Citicorp. Guided by the factors suggested by Judge Cardamone in Passalacqua, we note that at the time of the breach in 1984: (1) CBI had observed no corporate formalities for at least two years; (2) CBI kept no corporate records or minutes and had no officers or directors elected in accordance with its by-laws; (3) CBI had no assets, and its initial capitalization of $10,000 was insignificant when compared to the $7,000,000+ in loans that Diners Club and its predecessor, CBC, had advanced to finance CBI's business activity; (4) CBI had no separate offices or letterhead; (5) It had no paid employees; (6) It had no functioning board of directors; (7) All of CBI's revenues were put directly into Diners Club's bank account, and Diners Club paid all of CBI's bills; (8) CBI had no separate personnel or payroll; whatever services were provided to CBS from 1983 on came from full-time Diners Club employees; (9) CBI's revenues and marketing reports were not recorded independently, but were treated as part of Diners Club's revenues

and were combined with Diners Club's statistics; and (10) Flug was the only person who functioned on behalf of CBI. He occupied the position of Chairman of the Board in a carryover status; at the same time, however, he was also Chairman of the Board of Diners Club. Flug was paid no salary by CBI. When passing on CBS's advertising request, Flug acted not in the name of CBI but of Diners Club. Indeed, when he gave formal notice of default under the franchise agreement, it was as Chairman of Diners Club, not CBI.

All this evidence, none of which is in dispute, compels the conclusion that, by the time of the breach, CBI had ceased to function as a separate entity, and its operations and assets had been absorbed into Diners Club.

We do not quarrel with the district court's finding that Flug in good faith believed, however erroneously, that CBS had breached the franchise agreement. Whether in his own mind he thought he was acting on behalf of CBI or Diners Club is not the question. As indicated by the discussion in Passalacqua, the factors that determine the question of control and domination are less subjective than "good faith"; they relate to how the corporation was actually operated.

In short, just as there can be no doubt as to the power of Diners Club and Citicorp to control CBI's actions, there can be no question that the potential control and domination were actually exercised here. Most particularly, when Flug, as "Chairman" of Diners Club, actually caused the breach for which CBI was held liable in the arbitration, there was nothing of the CBI Corporation except Flug's position as "Chairman" of CBI and the corporate shell, whose preservation may have had some lingering tax benefits for Diners Club. No bank accounts, offices, stationery, transactions, or any other activities were maintained or carried on in the name of CBI. When the arbitration was conducted, the attorneys who appeared for CBI addressed and sent their bills directly to Diners Club and were paid by Diners Club over a million dollars in fees for their services.

We conclude that, in the unique circumstances of this case, New York law requires enforcement of CBS's judgment directly against Diners Club. Accordingly, we reverse the judgment of the district court and remand with a direction to enter judgment in favor of CBS.

Section Two Formation of Corporations

Process of Incorporation

Corporate existence and the attributes of "corporateness" begin with the filing of articles of incorporation or, in some places, when a government official issues a certificate of incorporation.

Setting up a corporation involves three necessary steps:

a) Preparing articles of incorporation (in some American states called the charter or the certificate of incorporation) according to the requirements of local law,

b) Signing of the articles by one or more incorporators MBCA § 1.(f).,

c) Submitting the signed articles to the concerning government institute for filing MBCA § 2.01.

Incorporators

The person or persons who execute the articles of incorporation are called "incorporators". Traditionally, at least three incorporators were required; but quite a few American states and even China today require only one incorporator.

Articles of Incorporation

The document filed with the government institute must contain certain mandatory information:

a) Name of the corporation,

b) Registered office and agent,

c) Capital structure of the corporation,

d) Purpose and powers of the corporation,

e) Size/Composition of board of directors,

f) Optional provisions. Corporate law is not fully enabling. Under some circumstances, provisions that deviate too far from corporate norms may not be enforceable.

Ultra Vires Doctrine

Early courts vigorously applied the *ultra vires* doctrine. Whenever a transaction was beyond the corporation's limited purposes or powers, either party to the contract could cancel it despite of the other party's full or partial performance. At the turn of last century, courts came to recognize the commercial uncertainty created by the *ultra vires* doctrine and rectified the doctrine in two respects. First, courts would permit an *ultra vires* defense if the contract was still enforceable. Second, courts interpreted charter provisions flexibly to authorize transactions acceptably incidental to the business. Modern statutes, including the MBCA, seek to eliminate the vestiges inherent in corporate incapacity. Neither the corporation nor any party doing business with the corporation can avoid its contractual commitments—whether executory or not—by accusing the corporation's incapacity.

The modern *ultra vires* doctrine thus renders only limited assurance that charter

provisions restricting the corporation's business scope will work.

Pre-incorporation Transactions

It can be often seen that the formation of a new corporation is not a clean birth. Transactions on behalf of the corporation, or in the corporate name, may occur before the articles of incorporation are filed and the corporation officially exists. Such transactions may occur with both parties fully knowing that the corporation is not yet formed (such as subscription agreements or contracts by promoters to ensure that the necessary business assets are available), or unintentionally unexpected delays in the formation of the corporation.

A corporation is not dependent on a contract made by its promoter for its own interests unless the corporation takes some affirmative action to execute such a contract. The action may be distinct words of adoption or it may be acceptance of the contract's benefits. A corporation may also become bound by such contracts through assignment or novation.

The promoter is liable in person for all contracts made on behalf of the corporation before its existence unless the promoter is exempted by the terms of the agreement or by certain circumstances. If the promoters are held liable, they are regarded as partners, and liable for all promotional contracts on a joint and several bases.

De Facto Corporation Doctrine and Corporations by Estoppel

The flaw in the incorporation may be so significant that it cannot be ignored and the corporation in no way can be accepted as a de jure corporation. Yet compliance may be sufficient for the recognition of a corporation. When this occurs, the association is called a *de facto* corporation. There are four elements of a *de facto* corporation in traditional sense: (1) a valid law exists under which the corporation could have been properly incorporated, (2) an attempt to organize the corporation has been made in good faith, (3)a genuine attempt to organize in compliance with statutory requirements has been made, and (4) corporate power has been used.

The imperfect in incorporation cannot be overlooked thus the association cannot be legally accepted as a *de facto* corporation. In such a context, there is no corporation. If the involved individuals proceed to run the business in spite of such irregularity, they may be held personally liable as partners for the business's debts. This rule is sometimes not applied when a third person has dealt with the business as though it were a corporation. In such instances, the third person is estopped from denying that the "corporation" has legal existence. In effect, there is corporation by estoppel with respect to that person.

Case 1-2-1 ***American Vending Services, Inc. v. Morse***

Case Study Questions:

1. Do you think the doctrine of estoppel is applied to protecting the rights of the incorporator, the corporation, or the third party?
2. In *American Vending Services, Inc. v. Morse* case, why didn't the court adopt the doctrine of *de facto* corporation?
3. Why did the court apply the doctrine of estoppel?

American Vending Services, Inc. v. Morse[1]

88 P2d 917 (Utah1994)

Wayne L. and Dianne L. Morse built the car wash in 1984 and operated it for approximately eleven months. Thereafter, they entered into a contract with Douglas M. Durbano and Kevin S. Garn, both licensed attorneys acting as officers of AVSI, to sell the car wash. Mr. Durbano and Mr. Garn claim that they represented to the Morses that the corporate entity, AVSI, would purchase and operate the car wash. At the time the parties executed the contract on July 10, 1985, Mr. Durbano had not filed the Articles of Incorporation for AVSI, although he had received permission from the Utah Division of Corporations to use the name American Vending Services, Inc. Mr. Durbano claims that he had twice tried to file Articles of Incorporation for this before the contract was executed. In both cases, however, the Articles of Incorporation were returned because of a name conflict. The Articles of Incorporation for AVSI were finally executed on August 1, 1985 and subsequently filed on August 19, 1985. Mr. Durbano's explanation for not filing the Articles of Incorporation before the parties executed the contract on July 10, 1985 was that he was "moving offices and was too busy and distracted from filing the articles". The Morses asserted personal liability of Mr. Durbano and Mr. Garn based on the fact that the corporation did not legally exist when the parties executed the contract. The trial court dismissed the Morses' claims against Mr. Durbano and Mr. Garn, finding that Mr. Durbano's efforts to twice file Articles of Incorporation "constitute[d] a bona fide attempt to organize the corporation".

AVSI operated the car wash for approximately three years. It experienced financial difficulty, however, almost from the beginning and failed to make any payments to the Morses on the balance owing under the sales contract. Mr. Durbano and Mr. Garn claim that Mr. Morse provided them with projected income figures that were padded and false. Mr.

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[1] Available from http://ut.findacase.com/research/wfrmDocViewer.aspx/xq/fac.19940628_0001.ut.htm/qx [accessed February 28, 2012].